Supreme Court, U.S.
FILED
081593 JUN 25 2009
OFFICE OF THE CLERK

No. 08-

IN THE

Supreme Court of the United States

JOHN NICHOLAS AND BRENDA NICHOLAS, individually, and as successors in interest to THE ESTATE OF DEMETRIOS JOHN NICHOLAS, deceased,

Petitioners,

v.

RICHARD M. BOYD, ROBERT ALLEN, HAROLD CHEUVRONT, and ROBERT FRANCISCO,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

WILLIAM W. CAMPBELL
303 West Fourth Street
Quarryville, PA 17566
(717) 786-4044

Counsel for Petitioners

223524

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

RECEIVED
JUN 29 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

QUESTIONS PRESENTED

1. WHETHER THE STATUTE OF LIMITATIONS APPLICABLE TO A CAUSE OF ACTION FOR DENIAL OF ACCESS TO THE COURTS BASED ON A WRONGFUL DEATH CLAIM, CAN ACCRUE BEFORE THE PLAINTIFFS HAVE KNOWLEDGE OF FACTS SUFFICIENT TO PLEAD THAT THE DEATH WAS IN FACT WRONGFUL.

2. WHETHER A CAUSE OF ACTION FOR DENIAL OF ACCESS TO THE COURTS UNDER 42 U.S.C. § 1983 ACCRUED WHEN THE PLAINTIFFS WERE AWARE THAT THERE WAS POLICE MISCONDUCT BUT BEFORE THEY HAD KNOWLEDGE OF FACTS SUFFICIENT TO PLEAD A CAUSE OF ACTION FOR WRONGFUL DEATH.

3. WHETHER SUMMARY JUDGMENT WAS ERRONEOUSLY GRANTED WHEN THERE WAS A QUESTION OF FACT CONCERNING THE ACCRUAL OF THE CAUSE OF ACTION FOR DENIAL OF ACCESS TO THE COURTS.

4. WHETHER THE DEFENDANTS WHO WERE ALLEGED TO HAVE OBSTRUCTED THE CRIMINAL INVESTIGATION INTO THE DEATH OF THE PLAINTIFFS' SON WERE ENTITLED TO QUALIFIED IMMUNITY.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF APPENDICES	iii
TABLE OF CITED AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE PETITION	9
CONCLUSION	15

TABLE OF APPENDICES

Page

Appendix A — Order And Judgment Of The United States Court Of Appeals For The Tenth Circuit Filed March 19, 2009 ..... 1a

Appendix B — Order Of The United States District Court For The District Of Colorado Granting Defendants' Motion For Summary Judgment Dated And Filed September 18, 2007 ..... 20a

Appendix C — Order Of The United States Court Of Appeals For The Tenth Circuit Denying Petition For Rehearing Filed April 2, 2009 ..... 33a

TABLE OF CITED AUTHORITIES

Page

CASES

Bell v. Milwaukee,
746 F.2d 1205 (7th Cir. 1984) 12

Chappell v. Rich,
340 F.3d 1279 (11th Cir. 2003) 11, 12

Christopher v. Harbury,
536 U.S. 403, 122 S.Ct. 2179,
153 L.Ed.2d 413 (2002) ..... *passim*

Pearson v. Callahan,
__ U.S. __, 172 L.Ed.2d 565,
129 S.Ct. 808 (2009) 13, 14

Ryland v. Shapiro,
708 F.2d 967 (5th Cir. 1983) 12

Scheeler v. City of Saint Cloud,
402 F.3d 826 (8th Cir. 2005) 12

STATUTES

28 U.S.C. § 1254(a) 1

42 U.S.C. § 1983 ..... i, 2, 3

Cited Authorities

Page

CONSTITUTIONAL PROVISIONS

U.S. Constitution, Article IV § 2, cl 1 2

U.S. Constitution, Amendment 1 2

U.S. Constitution, Amendment 5 2

U.S. Constitution, Amendment 14, Sec. 1 3

PETITION FOR A WRIT OF CERTIORARI

John Nicholas and Brenda Nicholas, individually and as successors in interest to the Estate of Demetrios John Nicholas, deceased, the Petitioners herein, respectfully pray that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the 10th Circuit entered in the above-entitled case on March 19, 2009.

OPINIONS BELOW

The March 19, 2009 Order and Judgment of the Court of Appeals is not reported. It is docketed to No. 07-1444 and is reprinted in the Appendix to this Petition at pages 1a-19a. The April 2, 2009 Order of the Court of Appeals denying the Petition for Rehearing is reprinted in the Appendix to this Petition at page 33a. The Order granting Defendants' Motion for Summary Judgment filed by the United States District Court for the District of Colorado is not reported. This case was docketed in the District Court at No. 05-cv-02064-REB-MEH. This Order is reprinted in the Appendix to this Petition at pages 20a-32a.

JURISDICTION

The Court of Appeals' judgment was entered on March 19, 2009. A timely Petition for Re-hearing was denied on April 2, 2009. (App., *infra*, 33a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This suit was brought pursuant to 42 U.S.C. § 1983, which states:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress except that. . . ."

"The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." U.S. Constitution, Article IV § 2, cl 1.

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the people peaceably to assemble, and to petition the government for redress of grievances." U.S. Constitution, Amendment 1.

"No person shall . . . be deprived of life, liberty or property, without due process of law;. . . ." U.S. Constitution, Amendment 5.

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

U.S. Constitution, Amendment 14, Sec. 1.

STATEMENT OF THE CASE

On October 19, 2005, Plaintiffs, John and Brenda Nicholas, of Fredericksburg, Texas filed a civil rights lawsuit pursuant to 42 U.S.C. § 1983 in the United States District Court in Denver, Colorado, against four employees of the Colorado School of Mines, Golden, Colorado. The employees Defendants were Richard M. Boyd, the chief of the school's police department; Robert Allen, a sergeant in the police department; Harold Cheuvront, the Dean of Students; and Robert Francisco, the Assistant Dean of Students. Plaintiffs alleged that the Defendants, while acting under state law, conspired to deny them their constitutional right of access to the Colorado courts by suppressing, concealing and depriving them of evidence necessary to bring a wrongful death cause of action against those responsible for the death of their son.

The relevant facts are that Rio Nicholas, the Plaintiffs' 19-year old son and a freshman at the Colorado School of Mines on a full Air Force ROTC scholarship, died on campus in the early morning hours of December 6, 2001. A dormitory suitemate found Rio's dead body, (with bruises on his knuckles, on the upper part of his feet and on his forehead) seated upright with legs crossed in a 3'x3' bloodstained shower stall in the bathroom of his freshman dormitory. A capped used syringe later determined to contain cocaine residue was found lying on the floor of the shower beside the body.

Rio's roommate, Brandon Reese, called 911 at approximately 6:00 a.m. after Rio's suitemate and friend Jonathan Fuchs discovered Reese standing over Rio's body holding a syringe. Local EMS was the first responder. Golden Police Department arrived on the scene next and were performing standard police procedure when they were asked to leave by Defendants Boyd and Allen who arrived approximately 20 minutes later. The death scene investigation was conducted by the coroner's investigator and the Defendants. The body was removed to the county morgue. The coroner drew a sample of Rio's blood and sent it to a private laboratory in Boulder, Colorado where it was analyzed on the same day. The coroner took the syringe that was found in the shower next to Rio's body but performed no tests or fingerprint analysis on it.

Allen found two used syringes in the wastebasket in Rio and Brandon's room. Boyd told John Nicholas that all three syringes had been fingerprinted and tested for blood type and the tests showed that Rio had used them all; but this representation was not true.

The coroner only found one injection hole on Rio's body. Boyd also told John Nicholas that Rio had used all three syringes on himself by sticking the three needles in the same hole, a claim that the coroner rejected as almost impossible. The coroner shipped Rio's body to the morgue for embalming on the same day as his death and before the results of the clinical toxicology screen had been returned.

The Boulder lab reported that a large quantity of cocaine was present in the blood. This conclusion was wrong. On December 7, 2001, the county coroner determined, without conducting an autopsy, that the cause of death was due to self-inflicted cocaine overdose. Defendant Boyd adopted the county coroner's findings in his determination that the death was due to an accidental overdose.

Plaintiffs suspected foul play in the death of their son almost immediately and these suspicions were inflamed by various evidentiary inconsistencies, factual contradictions and unanswered questions that arose from the circumstances surrounding his death as well as by untruths offered up to them by Boyd and Francisco. The Plaintiffs hired a private investigation firm, Sage Investigations, to investigate Rio's death in order to build a factual basis that would inspire the Jefferson County District Attorney to initiate a criminal investigation by showing him police misconduct. This report was completed in May of 2003. ("Sage Report"). It focused on and explored to great length many evidentiary inconsistencies and factual contradictions that had haunted the Plaintiffs concerning their son's death. The report criticized,

challenged and disagreed with the investigative performance of Boyd and Allen and with Francisco's complicity in that performance.

In May of 2003, the Plaintiffs personally wrote letters to the Jefferson County District Attorney expressing their dissatisfaction and frustration with the Colorado School of Mines police and beseeching the District Attorney to perform an independent investigation.

In April of 2005, the Plaintiffs received a report from Denver physician, Joseph Batuello, M.D., in which the doctor expressed the opinion that it was impossible that Rio's death was accidentally brought about by self-induced drugs. Batuello took scientific issue with the cause of death and the manner of death that Boyd and Allen had voiced in support of their conclusion of accidental death. It was this report together with some other scientific evidence that followed that led to the development of the Plaintiffs' belief that a wrongful death may have occurred.

The Batuello report was followed on June 13, 2005 by an opinion from Linda Norton, M.D., the former medical examiner of Dallas County, Texas and an expert criminal forensic pathologist. After reviewing the Colorado School of Mines investigative report and information obtained by Sage Investigations, Dr. Norton determined: (1) that Rio's body had been moved into the shower to intentionally stage an unintended death, and (2) that Rio did not act alone in bringing on his death and (3) that the time of death was at least three hours earlier than the Coroner had reported. This third

conclusion conflicts with the statement made by Brandon Reese to the Defendants that Rio had gotten out of bed at 3:00 a.m. to go watch TV. In a later deposition, Dr. Norton set forth her opinion of how death occurred, a scenario totally consistent with the wrongful death at the hand of others. Finally, in August of 2005, the Plaintiffs received a scientific report from the National Medical Services Laboratory in Reading, Pennsylvania containing the results of a retest of a post-mortem sample of Rio's blood, finding that no cocaine was present in his blood; a conclusion that stands in direct opposition to the cocaine overdose cause of death asserted by the Jefferson County coroner and Boyd.

The Plaintiffs contended below that it was not until they received the Batuello report, the Norton Opinion and the National Medical Services report that they had a sufficient evidentiary basis upon which to claim that a wrongful death had occurred.

Following the filing of the Complaint in October 2005, the four Defendants filed a single Answer admitting they were state employees acting under color of law, but denying the material allegations of Plaintiffs' Complaint. Defendants alleged that Plaintiffs failed to state a claim on which relief could be granted and specifically pleaded numerous affirmative defenses including the statute of limitations and qualified immunity. Plaintiffs filed an Amended Complaint to which Defendants filed an Answer raising the same defenses.

In December of 2006, the Defendants moved for summary judgment on two grounds: (1) the applicable, two-year Colorado statute of limitations barred

Plaintiffs' cause of action and (2) the challenged conduct of the Defendants was subject to the doctrine of qualified immunity. After answers and briefs were filed, the District Court granted the Motion for Summary Judgment on the statute of limitations ground alone and dismissed the Plaintiffs' claims with prejudice. (*See*, Order granting Motion for Summary Judgment attached in Appendix hereto).

On October 12, 2007, the Plaintiffs filed a Notice of Appeal. Briefs were filed by the parties and argument was held before a three-judge panel of the Tenth Circuit Court of Appeals. On March 19, 2009, the Tenth Circuit, by Judges Kelly, Lucero and Murphy, affirmed the grant of summary judgment in an unpublished Order and Judgment. Judge Lucero concurred in the judgment, finding that the statute of limitations did not bar the claim but that qualified immunity was applicable. Plaintiffs filed a timely application for rehearing which was denied on April 2, 2009. Plaintiffs now request that this Court grant Certiorari primarily to address the statute of limitations issue and interpret this Court's decision in *Christopher v. Harbury*, 536 U.S. 403 (2002), which sets forth the elements for a cause of action for denial of access to the courts.

REASONS FOR GRANTING THE PETITION

Christopher v. Harbury assumed, but explicitly did not decide, that there is a recognized constitutional cause of action for denial of access to the Courts but also held that such a cause of action required the plaintiff to plead a non-frivolous arguable underlying cause of action so as to give fair notice to the defendant.

The few published opinions evidence that the Courts of Appeal analysis of these cases has been murky, at best.

Here, Plaintiffs did not file their suit until they possessed sufficient facts to plead a valid underlying cause of action for a wrongful death. It was only in 2005 that the Plaintiffs could plead in good faith a wrongful death claim, that their son had been a victim of homicide. It was this cause of action which the Defendants wrongfully prevented Plaintiffs from pursuing. Now is the time for the Court to address the viability of this cause of action for denial of access to the Courts, and its accrual.

The Court below ignored *Christopher v. Harbury* in determining as a matter of law the statute of limitations bar. Plaintiffs were thereby penalized for complying with the *Christopher* holding, for not suing until sufficient facts were known to them.

In *Christopher v. Harbury*, 536 U.S. 403, 122 S.Ct. 2179, 153 L.Ed.2d 413 (2002), the widow of a foreign national brought suit against the CIA, State Department, National Security Council and members of each of these agencies in their official and individual capacities. She sought relief on a claim of denial of access to the courts. She alleged that while her husband was engaging in dissident activities in his own country, he was detained, tortured and ultimately executed by military officials who were paid by the CIA. She claimed that officials of the State Department intentionally and repeatedly misinformed her of her husband's status and the efforts of the federal government to assist her in ascertaining his status.

In holding that the Complaint did not state a denial of access claim, this Court reasoned that a right of access to the courts is ancillary to an underlying claim, without which a plaintiff cannot have suffered injury by being shut out of court. This Court reasoned that the "underlying cause of action, whether anticipated or lost is an element that must be described in the Complaint, just as much as allegations must describe the official acts frustrating litigation." 536 U.S. 415, 122 S.Ct. 2187, 153 L.Ed.2d 425.

The Tenth Circuit failed to recognize that Plaintiffs' cause of action did not accrue until June of 2005. In the present case, the Tenth Circuit majority held that it was the petitioner's knowledge in May 2003 of facts indicating that the university police were intentionally trying to frustrate their inquiries into the nature of the death of their son that triggered the commencement of the running of the two-year statue of limitations

applicable to denial of access claims. As noted in Judge Lucero's concurring opinion, the majority ignored the fact that under *Christopher v. Harbury*, the plaintiffs needed to also plead facts sufficient to support a claim for wrongful death. In *Christopher*, the plaintiff could not articulate a denial of access claim because she had not pleaded that wrongful acts by government officials had denied her of access to the courts to pursue a wrongful death claim, which she had in fact filed and which was then pending in federal court.

This Court's reasoning in *Christopher* is applicable to the present case because the denial of access cause of action could not accrue under Colorado law until the Plaintiffs had knowledge of facts which would support the underlying claim for wrongful death. Since this critical information was not obtained by the Plaintiffs until 2005, a few months prior to the filing of the present lawsuit, there is at least a jury question concerning the accrual of statute of limitations.

Since this Court's decision in *Christopher v. Harbury*, two Courts of Appeal have addressed relevant right of access claims. In *Chappell v. Rich*, 340 F.3d 1279 (11th Cir. 2003), the plaintiff's decedent was shot and killed on March 23, 1964 in a drive-by shooting during a period of racial unrest in Jacksonville, Florida. In 1996, members of the decedent's family were advised for the first time that the sheriff's office had interfered in the criminal investigation. In affirming the dismissal of the 1983 action, the Court noted that there was no denial of access claim since the children of the decedent knew that she had been murdered and who the alleged perpetrators were prior to the expiration of the statute

of limitations. Quite simply, there was no underlying action which could not have been brought due to the wrongful acts of the police authorities. The Eleventh Circuit contrasted two other cases where the plaintiffs had lost a right of action and therefore articulated a viable claim for denial of access. *See, Ryland v. Shapiro*, 708 F.2d 967 (5th Cir. 1983); *Bell v. Milwaukee*, 746 F.2d 1205 (7th Cir. 1984). In *Ryland*, the plaintiffs did not know that a crime had been committed because the police had concealed their daughter's murder as a suicide. In *Bell*, the family's attempt to seek redress for the wrongful death was thwarted by the false police representation that the Bell shooting was in self-defense.

In another recent case, the Eighth Circuit took an approach differing from the *Chappell* Court's analysis. In *Scheeler v. City of Saint Cloud*, 402 F.3d 826 (8th Cir. 2005), the plaintiffs brought an action for a denial of the right of access. Their claim was that an improper police investigation indicated that their son had committed suicide while engaging in a game of Russian roulette when, in fact, someone else had shot him. The parents brought a wrongful death claim in state court which was unsuccessful. They then filed the right of access claim which was dismissed on summary judgment. In affirming the grant of summary judgment, the Eighth Circuit never addressed whether the plaintiffs were prevented from pursuing their underlying cause of action, ignoring *Christopher v. Harbury*. Instead, the Court focused on the fact that there was no allegation in the Complaint sufficient to establish intentional acts or a deliberate indifference on the part of the police during the conduct of their investigation. That the underlying claim had not been burdened was ignored by the Eighth Circuit.

The Tenth Circuit erred by affirming the grant of summary judgment when substantial factual disputes (noted in the Statement of the Case, *infra*) were the province of the jury.

Since the Tenth Circuit majority in this case clearly misunderstood the nature of the elements of the claim for denial of access and other Circuit Courts since *Christopher v. Harbury* have taken divergent approaches in conducting their analyses, Petitioners urge this Court to find compelling reasons and grant this Petition.

The Defendants were not entitled to qualified immunity as a matter of law. To the extent that the Circuit's decision can be construed as granting Defendants qualified immunity, this decision also contradicts clear precedent and the established law. Judge Lucero in concurrence cites *Pearson v. Callahan*, __ U.S. __, 172 L.Ed.2d 565, 129 S.Ct. 808 (2009) for the proposition that a Court may grant qualified immunity without deciding whether a violation occurred when the right claimed to have been violated was not clearly established. He then opines that in this fact-intensive case, which he believes was premised on a "constitutional claim of unclear viability," that qualified immunity should apply. (*See*, Appendix at page 19a).

It is true that in *Christopher v. Harbury*, this Court specifically stated that it would not address whether there actually was a constitutionally-viable claim for denial of access to the Courts based on the theory that government action prevented the plaintiffs from ever being able to file a meritorious case. That does not mean

that such claim, although not specifically addressed, is not clearly viable. In *Christopher v. Harbury*, this Court took pains to point out that such a claim has been premised on a variety of constitutional provisions and it cited numerous lower court decisions where the denial of a right of access claim was recognized. *See, infra* at n. 7 and 9.

Thus, qualified immunity should not shield the Defendants since it was clear at the time of intentional misconduct that these officers were "on notice that their conduct was unlawful." *See, Pearson v. Callahan* at 172 L.Ed.2d 581, 109 S.Ct. 822. This was not a situation where the officials could believe that their actions were appropriate. Engaging in lies and misrepresentation is never acceptable. This type of intentional misconduct, which attempted to bury the true cause of this college student's death, should never be condoned.

The Court should grant the Petition to clarify the existence of a constitutionally-based right of action for denial of access to the Courts. Since numerous cases have been litigated where the right of action has been at least implicitly recognized, the time is right for this Court to address the existence and scope of this right of action. If the Court finds that such an action is viable, it can then specify the specific constitutional provisions upon which this right of action is based. This will provide the District Courts and Courts of Appeals with necessary guidance in this area of the law.

CONCLUSION

WHEREFORE, Petitioners respectfully request that a Petition for a Writ of Certiorari be granted.

Respectfully submitted,

WILLIAM W. CAMPBELL
303 West Fourth Street
Quarryville, PA 17566
(717) 786-4044

Counsel for Petitioners

APPENDIX

APPENDIX A — ORDER AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT FILED MARCH 19, 2009

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 07-1444

(D. Colorado)

(D.C. No. 1:05-CV-02064-REB-MEH)

JOHN NICHOLAS, individually and as successor in interest to the Estate of Demetrios John Nicholas; BRENDA NICHOLAS, individually and as successor in interest to the Estate of Demetrios John Nicholas,

Plaintiffs - Appellants,

v.

RICHARD M. BOYD; ROBERT ALLEN; HAROLD CHEUVRONT; ROBERT FRANCISCO,

Defendants - Appellees.

ORDER AND JUDGMENT*

---

* This order and judgment is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Appendix A

Before **KELLY**, **LUCERO**, and **MURPHY**, Circuit Judges.

I. Introduction

Plaintiffs-appellants John and Brenda Nicholas initiated this action pursuant to 42 U.S.C. § 1983, asserting a violation of their right of access to the courts. Defendants-appellees are various employees of the Colorado School of Mines ("CSM"). Plaintiffs' son, Demetrios "Rio" Nicholas, was a freshman at CSM when he was discovered dead in the shower of his dorm suite. CSM concluded Rio's death was a self-induced drug overdose, but Plaintiffs suspect he was the victim of a wrongful death. They alleged Defendants intentionally covered up evidence suggesting Rio was the victim of a homicide. Plaintiffs further alleged crucial evidence was destroyed or tampered with by Defendants and it is now impossible for them to bring a viable wrongful death claim against the individual(s) responsible for Rio's death. Defendants moved for summary judgment based upon, *inter alia*, the statute of limitations, and the district court granted the motion. Assuming, without deciding, that Plaintiffs state a viable cause of action, we hold the action is barred by Colorado's two year statute of limitations because the action was commenced more than two years after Plaintiffs had knowledge of nearly all the facts relied upon in their amended complaint. We therefore **AFFIRM** the decision of the district court.

Appendix A

II. Background

Rio Nicholas was a freshman at CSM in the fall of 2001. In the early morning hours of December 6, 2001, Rio was found dead in the shower of his dorm suite. Rio had a needle mark on his arm and a capped, used syringe was on the shower floor. The CSM police report stated Rio was already dead when the police arrived. The campus police closed their investigation the following day after the investigator from the county coroner's office concluded the death was a cocaine overdose.

Plaintiffs suspected the death was not accidental. When Rio's body was discovered, there were bloody abrasions on his knuckles and the toes of one foot. His forehead was discolored. The mortician preparing the body for burial also noted bruising on his chin and indelible grid-shaped marks on the left side of his face. Plaintiffs were wary of Rio's roommate, Brandon Reese, who had first discovered Rio's body and who was arrested by CSM police in early 2002 for possession of drugs. When Rio was home for Thanksgiving, he had described Reese and Reese's friends as "dirty."

At the suggestion of Rio's ROTC officer, who thought the death was suspicious, Plaintiff John Nicholas read the CSM police report in January 2002. The report raised further concerns in his mind. The report described two additional used syringes in the dorm room's trash can, suggesting to John that multiple people were using drugs because Rio had but one

puncture mark on his arm. Rio's jeans were on the floor of the bathroom and the pockets contained only cocaine and syringe packaging, raising questions in John's mind about whether the jeans had been planted. The police found ninety-two syringes in Rio's backpack, which John also found suspicious.

In January and February of 2002, Plaintiffs contacted and met with various CSM officials to express their concerns about CSM's official explanation of Rio's death. They also contacted Rio's instructors, his friends on campus, and the coroner's office. In February 2002, CSM promised it would retain a private investigator to investigate the matter. Plaintiffs soon learned, however, that CSM did not in fact hire a private investigator but instead instructed the campus police to conduct another investigation. Still unsatisfied with CSM's handling of the matter, Plaintiffs contacted an attorney in the summer of 2002 to help find out what had happened to Rio. The attorney, Michael Hinton, hired two investigators and put Plaintiffs in touch with a third investigator. John Nicholas testified that CSM imposed various roadblocks to hinder Edmond Martin, one of the investigators.

The investigators hired by Plaintiffs in 2002 interviewed witnesses, communicated with county officials, and reviewed official documents. In March of 2003, Edmond Martin's firm, Sage Investigations, released to Hinton a Final Report ("Sage Report") on Rio's death. John Nicholas testified he reviewed the report after it was completed.

Appendix A

The Sage Report contained, among other things, a detailed examination of the facts and circumstances surrounding Rio's death and concluded "questions still exist about the death of Rio Nicholas." The Report listed numerous "inconsistencies" with CSM's official explanation. The Report also identified numerous problems with how the campus police handled the matter. These problems included the failure to secure the dorm suite where the body was found and preserve it as a crime scene, the failure to adequately examine Rio's body for evidence, the failure to preserve the syringes found in Rio's apartment or examine them for fingerprints and blood residue, and the failure to adequately interview material witnesses.

The Sage Report stopped short of alleging the campus police intentionally mishandled the investigation. It did allege the police "prejudged" the situation. It also alleged one police officer, Sargeant Allen, was prejudiced against Rio because Allen had been in the Air Force and he thought Rio was a poor candidate for Air Force ROTC in light of his tattoos and piercings. The report also questioned whether the campus police were biased in favor of Brandon Reese because he had worked for the department as a dispatcher. Finally, the Sage Report alleged the supplemental police investigation conducted at the Nicholas's urging was primarily concerned with identifying the source of the drugs for the benefit of the local drug task force.

Martin sent a version of the Sage Report to the Jefferson County District Attorney's Office. The district attorney's office had conducted an investigation in the spring of 2002 that accepted the findings of the campus police. On May 6 and May 7, 2003, Brenda and John Nicholas wrote separate letters to the District Attorney requesting a new investigation. The letters indicated Plaintiffs' belief that Rio's death was not a self-induced, unattended drug overdose. The letters also indicated Plaintiffs believed they had been intentionally misled by the CSM police.

Following Plaintiffs' renewed pleas for help, the district attorney's office looked into the case again. Plaintiffs were ultimately dissatisfied with this investigation because the district attorney's office declined to perform various forensic tests requested by Plaintiffs. Plaintiffs provided the Sage Report to a medical expert, Dr. Joseph Batuello, who, in April of 2005, sent a letter to one of Plaintiffs' attorneys with various "observations" regarding Rio's death. Dr. Batuello believed the amount of cocaine found in Rio's body was consistent with a cocaine overdose, but found it "highly unlikely" that Rio used more than one syringe. Dr. Batuello also stated that without a carefully conducted autopsy it was impossible to rule out trauma, asphyxiation, or poisoning as possible causes of death. Finally, Dr. Batuello observed that the blood on the wall of the shower likely did not come from the abrasions on Rio's hands and feet, because the blood vessels in extremities are too small to deposit blood on a surface not in contact with the wound. In June of 2005, Dr. Linda

Norton, a former medical examiner, reviewed the Sage Report and drafted a one-page opinion concluding Rio was in a group setting when he was injected with a lethal dose of cocaine, his body was subsequently moved into a shower stall, and evidence was planted in an attempt to cover up what had occurred.

Plaintiffs also obtained samples of Rio's blood and urine from the coroner's office. They submitted the samples to a laboratory for testing and in August of 2005 Plaintiffs learned the lab results. The lab results indicated Rio had far less cocaine and cocaine metabolites in his blood than had originally been reported. A consultant, Earnest Street, opined that based upon these lab results, Rio did not die of a cocaine overdose.

On October 19, 2005, John and Brenda Nicholas filed suit against Richard M. Boyd, the Chief of Police and Director of Public Safety for CSM; Robert Allen, a sergeant in the CSM police department; Harold Cheuvront, a dean at CSM; and Bob Francisco, another CSM employee. The complaint set forth claims of denial of access to the courts and conspiracy to deny access to the courts.[1] The claims were brought under 42 U.S.C. § 1983. The plaintiffs identified the right of access to the courts as a right guaranteed by Article IV of the Constitution, the First and Fourteenth Amendments, and the Civil Rights Act of 1971.

---

1. Plaintiffs have abandoned their conspiracy claim on appeal.

Appendix A

The amended complaint alleged a number of facts suggesting Rio's death was not an accidental, self-induced drug overdose. These facts are: Rio's body was found in an upright seated position with his legs crossed; he had discoloration in his face and forehead and a grid-shaped imprint on his face, suggesting he died with his head on the floor; blood was smeared on the shower wall, suggesting an open wound on Rio's head or torso; Rio made statements when he was home during Thanksgiving that Reese and Reese's friends were "dirty people" and that Rio was being stalked by a CSM student; there were abrasions on Rio's body and bruises on his hands and feet which suggested his body was moved after he was incapacitated; the syringe in the shower was capped, and Rio was unlikely to have capped the syringe after injecting a lethal amount of cocaine; when another roommate came upon Rio's dead body, Reese was already present and holding the capped syringe in his hand; Rio had only one puncture wound, but there were three used syringes found in the dorm room; the only items in the pockets of the jeans found in the bathroom were drug paraphernalia; Rio's bed was made and covered with school items, suggesting Rio had not slept in it the night of his death; Reese changed his story of why Rio took a shower; Philip Javernick, another CSM student who had Rio's name tattooed on his body,[2] purchased cocaine the day before Rio's death and left

2. Some students told investigators Javernick got the tattoo after Rio died, but another witness said when Rio was home for Thanksgiving he had mentioned a "stalker" with Rio's name tattooed on his body.

CSM shortly after Rio's death without returning; Javernick and Reese gave an alibi regarding their whereabouts the night Rio died that was contradicted by eyewitnesses; and Rio's backpack was open when his body was discovered, but when police retrieved the backpack the next day it was padlocked shut and contained ninety-two syringes.

After discovery, Defendants moved for summary judgment on two grounds: the statute of limitations and qualified immunity. The district court granted summary judgment based upon the statute of limitations.

III. Discussion

This court reviews a grant of summary judgment de novo, "applying the same standards as the district court." *ACLU v. Santillanes*, 546 F.3d 1313, 1317 (10th Cir. 2008). Summary judgment is appropriate when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). Facts are viewed in the light most favorable to the nonmoving party. *Santillanes*, 546 F.3d at 1317.

Plaintiffs seek relief pursuant to 42 U.S.C. § 1983. The applicable statute of limitations in § 1983 actions is generally the residual statute of limitations for personal injury actions in the forum state. *Owens v. Okure*, 488 U.S. 235, 249-50 (1989). In Colorado, the applicable statute of limitations is two years. Colo.Rev.Stat. § 13-80-102(1)(i); *Blake v. Dickason*, 997 F.2d 749, 750-51 (10th Cir. 1993).

Although Colorado law supplies the applicable statute of limitations, federal law governs the accrual of a federal cause of action. *Smith v. City of Enid*, 149 F.3d 1151, 1154 (10th Cir. 1998). "A civil rights action accrues when the plaintiff knows or has reason to know of the injury which is the basis of the action." *Id.* (quotation omitted). Claims under § 1983 assert a violation of a federal right, and therefore such claims accrue when the plaintiffs know or should know their rights have been violated. *Id.* A plaintiff "need not have conclusive evidence of the cause of an injury in order to trigger the statute of limitations." *Alexander v. Okla.*, 382 F.3d 1206, 1216 (10th Cir. 2004). Nor must a plaintiff "know all of the evidence ultimately relied on for the cause of action to accrue." *Baker v. Bd. of Regents*, 991 F.2d 628, 632 (10th Cir. 1993). "A civil rights action accrues when facts that would support a cause of action are or should be apparent." *Fratus v. DeLand*, 49 F.3d 673, 675 (10th Cir. 1995) (quotation omitted). The test is an objective one, with the focus "on whether the plaintiff knew of facts that would put a reasonable person on notice that wrongful conduct caused the harm." *Alexander*, 382 F.3d at 1216.

For the purpose of evaluating the statute of limitations defense, this court assumes, without deciding, the amended complaint makes out a viable claim for denial of access to the courts.[3] A claim for denial of access

---

3. Defendants assert the Tenth Circuit has never recognized the type of denial of access to the courts claim being asserted by Plaintiffs, and they are therefore entitled to (Cont'd)

to the courts is ancillary to some underlying state or federal action. *Christopher v. Harbury*, 536 U.S. 403, 415 (2002). Plaintiffs claim Rio was the victim of a wrongful death. For Plaintiffs to bring a wrongful death action under Colorado law, they must prove Rio was fatally injured by "a wrongful act, neglect, or default of another." Colo. Rev. Stat. Ann. § 13-21-202. Plaintiffs assert it is now impossible to prove Rio died due to the wrongful acts of another person because the Defendants' intentional acts deprived them of the necessary evidence to do so. Therefore, the claim for denial of access to the courts accrued when Plaintiffs knew, or should have known, the acts of Defendants deprived them of evidence necessary to bring a wrongful death action.

(Cont'd)

qualified immunity. *See Jennings v. City of Stillwater*, 383 F.3d 1199, 1207 (10th Cir.2004) (stating the Tenth Circuit has not recognized a claim of denial of access to the courts for a police cover-up); *Wilson v. Meeks*, 52 F.3d 1547, 1557 (10th Cir. 1995) (stating Tenth Circuit precedent did not clearly establish a duty to avoid a police cover-up, but not resolving the question). *But see Donohue v. Hoey*, 109 Fed.Appx. 340, 356-57 (10th Cir. 2004) (stating intentional destruction of evidence can constitute a violation of the right of access to the courts); *Stump v. Gates*, No. 92-1134, 1993 WL 33875, at *2-3 (10th Cir. Feb. 11, 1993) (holding police department employees are not entitled to qualified immunity to claim that "deliberate failure to investigate and quick destruction of evidence that might have proved homicide was a violation of [plaintiffs'] right of access to the courts"). This court need not rule on the question because, even if Plaintiffs have a cognizable claim, it is barred by the applicable statute of limitations.

The district court concluded that, at the latest, the statute of limitations began to run on May 7, 2003, when John Nicholas mailed a letter to the Jefferson County District Attorney's Office with allegations of foul play and police misconduct in connection with Rio's death. Because the test for accrual of the statute of limitations is objective, *see Alexander*, 382 F.3d at 1216, the contents of John and Brenda's letters to the District Attorney are only relevant insofar as they reveal what facts were known, not for the beliefs or suspicions they contain. The letters sent in May 2003 do mention some of the facts relied upon in the amended complaint. More relevant to the question of the extent of Plaintiffs' knowledge, however, is the Sage Report, which John Nicholas testified he reviewed in the spring of 2003. The Sage Report contains nearly all of the facts contained in the amended complaint. It contains synopses of Rio's conversations with family and friends in Texas over Thanksgiving; the changes in Reese's story; Javernick's purchase of cocaine; the eyewitness testimony refuting Reese's and Javernick's alibi; details regarding the position and appearance of Rio's body; and discussions about the evidence in the dorm room, including the extra syringes, the jeans, and the backpack.

Only one fact relied upon in the amended complaint is absent from the Sage Report: the fact that the syringe in the shower was capped. This fact was in a police report filed by the Golden Police Department, which was obtained by Plaintiffs' investigator. The record does not indicate whether this police report was appended in its entirety to the Sage Report, and therefore it is unclear

when Plaintiffs learned of this fact. Even if Plaintiffs learned of the cap on the syringe at some later date, however, the Sage Report still contained nearly all of the facts underpinning the Plaintiffs' theory, set out in the amended complaint, that Rio's death was wrongful. The statute of limitations may begin to accrue before a party has all the evidence supporting its case. *Baker*, 991 F.2d at 632. It begins to run when the plaintiff knows facts sufficient to support a cause of action. *Fratus*, 49 F.3d at 675. Based upon the facts in the Sage Report, Plaintiffs could have drafted a complaint in the spring of 2003 nearly identical to the amended complaint filed over two years later.

The only information identified by Plaintiffs which they received after the spring of 2003 is from Dr. Batuello's letter, Dr. Norton's draft opinion, and the toxicology lab results. Plaintiffs claim they only had a sufficient factual basis to proceed on their denial of access to the courts claim once they received these communications. In particular, they assert they did not earlier know Rio's death was wrongful. Plaintiffs do not assert they learned of any new police misconduct after the spring of 2003.

As an initial matter, two of the three communications Plaintiffs received after the spring of 2003 were the opinions of experts based entirely upon facts contained in the Sage Report and known to Plaintiffs in the spring of 2003. The only genuinely new information Plaintiffs learned after the spring of 2003 was the lab results reported in August 2005. The lab results, if believed,

strengthened the hypothesis that the cause of death was not a cocaine overdose. They were not, however, the crux of Plaintiffs' case that Rio's death may have been wrongful. In fact, the lab results are not even mentioned in the amended complaint, which lists a drug overdose as a possible cause of death.[4] In the amended complaint, Plaintiffs alleged the position and appearance of Rio's body, as well as the suspicious placement of drug paraphernalia in the dorm suite, gave Defendants reasonable cause to believe "that probable cause existed to commence a homicide investigation." The lab results may have strengthened the claim that the official explanation of Rio's death was incomplete, but the statute of limitations may begin to run before all the evidence in a case is collected. *Baker*, 991 F.2d at 632 (holding the statute of limitations begins to run when a plaintiff knows or should know of the injury). The amended complaint is based almost entirely upon facts present in the Sage Report and therefore known to Plaintiffs no later than the spring of 2003. Based on the facts known to Plaintiffs in the spring of 2003, they knew or should have known of the injury they alleged in their complaint.[5]

---

4. The lab results were referenced in the original complaint.

5. Plaintiffs rely heavily upon *Stump v. Gates*, 777 F.Supp. 808 (D.Colo.1991), *aff'd*, 986 F.2d 1429 (10th Cir.1993) in arguing the statute of limitations has not expired. *Stump* is distinguishable. In that case, the plaintiffs never performed their own investigation into the death of their father, and the district court concluded they were under no duty to do so to

(Cont'd)

Plaintiffs also argue the statute of limitations question involves disputed issues of fact and was thus inappropriately resolved at the summary judgment stage. They cite to numerous cases from federal and state court for the proposition that the reasonable diligence of a plaintiff in discovering information giving rise to a cause of action is a question of fact. This case, however, is not about reasonable diligence. Regardless of whether it was reasonable to conduct their own investigation, Plaintiffs did so, and thereby gained actual knowledge of the facts underlying their claim. It was therefore proper for the district court to resolve the statute of limitations question at the summary judgment stage.

Finally, Plaintiffs argue the statute of limitations question is inextricably tied to the ultimate factual question of whether Rio's death was wrongful. Because the wrongfulness of Rio's death is a question of fact, Plaintiffs argue, so too is the question of when they knew the death was wrongful. This argument, however, is premised on a fundamental misunderstanding of the statute of limitations inquiry. In determining whether the statute of limitations has expired, a court considers when the plaintiff knew or should have known the facts

---

(Cont'd)
avoid the expiration of the statute of limitations. *Id.* at 822. Here, whether they had a duty to do so or not, Plaintiffs did in fact undertake their own investigation into the death of their son. Because they had knowledge of the injury they allege in the spring of 2003, the statute of limitations began to accrue no later than that time.

supporting the claim. *Fratus*, 49 F.3d at 675. Here, the complaint is almost entirely supported by facts known to the plaintiffs more than two years before they filed suit. It requires no resolution of the ultimate merits of the case to conclude that a suit based upon facts known for more than two years is barred by a two-year statute of limitations.

IV. Conclusion

Because the factual allegations in the amended complaint were nearly all known to Plaintiffs over two years prior to the filing of their suit, the suit is barred by the two-year statute of limitations. The judgment of the district court is hereby **AFFIRMED.**

ENTERED FOR THE COURT

Michael R. Murphy
Circuit Judge

LUCERO, J., concurring in the judgment.

I respectfully disagree with my colleagues' analysis of the statute of limitations issue, which, in my view, falters for two reasons. First, the majority inquires solely into the plaintiffs' knowledge of official misconduct while failing to examine whether the plaintiffs knew they had an arguable wrongful death claim, an element of an access to courts cause of action. Second, the majority analyzes the plaintiffs' subjective knowledge of the facts alleged in their complaint without asking whether, in addition, those facts should have put them on notice of their right to sue. Yet because I conclude that qualified immunity is available to the defendants, I would affirm on these alternative grounds.

The majority first concludes that "the claim for denial of access to the courts accrued when Plaintiffs knew, or should have known, the *acts of Defendants deprived them of evidence necessary* to bring a wrongful death action." Majority Op. at 15-16 (emphasis added). In light of the Supreme Court's holding in *Christopher v. Harbury*, 536 U.S. 403, 415 (2002), however, this cannot be the entire inquiry. In *Christopher*, the Court assumed that the right of access to courts can be violated due to official interference with the opportunity to seek relief and held that the existence of such an opportunity "is an element that must be described in the complaint."[1]

---

1. I agree with my colleagues that it is unclear in our circuit whether such a constitutional claim exists. *See* Majority Op. at 10-11 n. 3.

Id. Specifically, the "plaintiff must identify a nonfrivolous, arguable underlying claim." *Id.* (quotation omitted). If the existence of an underlying wrongful death claim is an element of the constitutional violation, surely a plaintiff's access to courts claim cannot accrue until she knows, or should know, of the arguable underlying claim.[2] Thus, the majority's exclusive focus on the plaintiffs' knowledge of official misconduct misses the mark.

As for my second point of disagreement, the majority reasons that "[b]ecause the factual allegations in the amended complaint were nearly all known to Plaintiffs over two years prior to the filing of their suit, the suit is barred by the two-year statute of limitations." Majority Op. at 15-16. This statement erroneously focuses on the plaintiffs' knowledge of those facts pleaded in the complaint. Yet plaintiffs' knowledge of the facts in the complaint is dispositive *only* if those facts were sufficient to put a reasonable person on notice of the injury that underlies the cause of action.

---

2. It is very much an open question what a plaintiff must allege to "identify a nonfrivolous, arguable" wrongful death claim. *See Christopher*, 536 U.S. at 415, 122 S.Ct. 2179. Because the very misconduct that plaintiffs seek to challenge will often prevent them from knowing enough to actually file a wrongful death claim, presumably they need not "identify" the underlying wrongful death claim with the same specificity we would require for such a claim to survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). Because I would resolve this case on qualified immunity grounds, I leave this question for another day.

See Alexander v. Oklahoma, 382 F.3d 1206, 1216 (10th Cir.2004) (using an objective test to determine when a federal cause of action accrues). By narrowly focusing on plaintiffs' knowledge of the facts alleged in the amended complaint without inquiring whether those facts would have put a reasonable person on notice of a constitutional violation, the majority risks transforming an objective inquiry into a subjective one.

As noted, I would affirm the grant of summary judgment, but on alternative grounds. Our law is anything but clearly established regarding the existence and contours of a § 1983 access to courts claim based upon official destruction of evidence or investigatory failures. *See* Majority Op. at 10-11 n. 3. *Pearson v. Callahan*, recently decided by the Supreme Court, allows a court to grant qualified immunity without deciding whether a violation occurred when the right claimed to have been violated was not clearly established. 129 S.Ct. 808 (2009) (reasoning that in cases where it is "far from obvious" that a right exists, it may be appropriate not to decide whether there has been a violation). This fact-intensive case, premised on a constitutional claim of unclear viability, would best be handled in that fashion.

For the foregoing reasons, I concur in the judgment of my respected colleagues.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT DATED AND FILED SEPTEMBER 18, 2007

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Robert E. Blackburn

Civil Case No. 05-cv-02064-REB-MEH

JOHN AND BRENDA NICHOLAS, individually and as successors in interest to THE ESTATE OF DEMETRIOS JOHN NICHOLAS, deceased,

Plaintiffs,

v.

RICHARD B. BOYD, ROBERT ALLEN, HAROLD CHEUVRONT, and ROBERT FRANCISCO,

Defendants.

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Blackburn, J.

This matter is before me on the **Defendants' Motion for Summary Judgment** [# 43], filed December

8, 2006. The plaintiffs filed a response [# 54] and the defendants filed a reply [# 65]. I grant the motion.[1]

I. JURISDICTION

I have jurisdiction over this case under 28 U.S.C. § 1331 (federal question).

II. SUMMARY JUDGMENT—STANDARD OF REVIEW

Under **Fed.R.Civ.P.** 56(c), summary judgment is proper only if the evidence, viewed in a light most favorable to the nonmoving party, demonstrates that there is no genuine issue as to any material fact, and the moving party is entitled to summary judgment as a matter of law. *Farthing v. City of Shawnee, Kan.* 39 F.3d 1131, 1134 (10th Cir.1994). A "material" fact is one "that might affect the outcome of the suit under the governing law," *Id.* at 1135 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)), and a "genuine" issue is one where "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* (citing *Anderson*, 477 U.S. at 248).

---

1. The issues raised by and inherent to the motion for summary judgment are fully briefed, obviating the necessity for evidentiary hearing or oral argument. Thus, the motion stands submitted on the briefs. *Cf.* **Fed.R.Civ.P.** 56(c) and (d). *Geear v. Boulder Cmty. Hosp.*, 844 F.2d 764, 766 (10th Cir.1988) (holding that hearing requirement for summary judgment motions is satisfied by court's review of documents submitted by parties).

Appendix B

II. FACTS

Based on the current record in this case, I find that the following facts are undisputed. On December 6, 2001, Rio Nicholas was found dead in the shower of his dormitory suite at the Colorado School of Mines (CSM). Plaintiffs Brenda and John Nicholas are the parents of Rio Nicholas. Rio Nicholas's death was investigated by defendant Robert Allen of the CSM Police, under the direction of defendant Richard Boyd. The Jefferson County Coroner's office conducted an investigation of the cause of Rio Nicholas's death and determined the cause of death to be cocaine toxicity. After the Coroner's determination, the CSM police closed its initial investigation, concluding that Rio Nicholas's death was caused by an accidental drug overdose.

In early 2002, plaintiff John Nicholas began to question whether CSM Police could be trusted to do a thorough and proper investigation of Rio Nicholas's death. *Motion for Summary Judgment* [# 43], filed December 8, 2006, Exhibit D (Deposition of John Nicholas) pp. 73-74. At a meeting held in February, 2002, John Nicholas presented a list of questions about the investigation of his son's death to CSM officials, including defendant Dean Harold Cheuvront. At that meeting, the president of CSM said he would recommend to the board of trustees that the school retain a private investigator to investigate Rio Nicholas's death. *Id.*, p. 82. John Nicholas later learned that the follow-up investigation would be conducted by defendants Boyd and Allen, members of the CSM Police

Department who were involved in the initial investigation. In May, 2002, defendant Boyd, Chief of the CSM Department of Public Safety, requested that the District Attorney's Office conduct a review of the CSM police investigation of Rio Nicholas's death. The District Attorney's Chief Investigator issued a report of his review on May 15, 2002. John Nicholas received a copy of that report at about that time.

After receiving the District Attorney's report, John Nicholas engaged an attorney, Michael Hinton, to assist him with questions he had about his son's death. In midsummer 2002, John Nicholas hired a private investigator to conduct an investigation of Rio Nicholas's death. Investigator Ed Martin's investigation was complete by March 20, 2003, and Martin issued a final, detailed report of his investigation on that date. *Id.*, Exhibit C. John Nicholas read Martin's report shortly after it was issued.

On May 6, 2003, Brenda Nicholas prepared a letter addressed to Dave Thomas, the District Attorney in Jefferson County, Colorado. Speaking of CSM officials, including the defendants, Brenda Nicholas says in her letter:

> Around the end of January 2002 I KNEW we were being put off, led on by Boyd And the powers that be.

* * * *

> They just stalled us, lied to us. letting more time go by. Time is of the essence, They did not want to know what happened to Rio—It would not be good for them. The[y] knew And still know Brandon [Reese, Rio's roommate] has been lying from the start . . .
>
> * * * *
>
> The contention that Rio died of a self induced, unattended drug overdose in the shower is as we say in Texas, absolute BULL____!! We do know Rio did not die in that shower.

Id., Exhibit I, pp. 1, 2.

On May 7, 2003, John Nicholas prepared a letter addressed to Dave Thomas, District Attorney in Jefferson County, Colorado. John Nicholas's letter of May 7, 2003, states:

> We have been so screwed around by the (Mines) authorities (DPS [Department of Public Safety] and Student Life). . . . As you study the evidence and get to know Rio through these people you too will see the absurdity of accepting Boyd's theory of what happened.
>
> * * * *

Appendix B

There is a preponderance of evidence to support our contentions that Rio could not have acted alone, did not die in the shower, had a very large amount of cocaine in his system and was at odds, to say the least, with the "Dirty People" (Reese, Jaberniks, Snyder, etc.) . . .

* * * *

In light of this evidence consider this: If you could incapacitate someone and introduce enough drugs to induce an overdose and then set the scene to make it appear that the person had acted alone, what would you have? The perfect crime! Add to that an incompetent, prejudiced law enforcement team (Boyd and Allen with support and complicity of Dean Cheveront Bob Francisco and Ed Libertore-Mines legal council) who were more concerned with protecting the school's reputations and their own butts than getting to the truth and you have a set of circumstances in play which have led to the train wreck we are now (and have been) witnessing. . . .

* * * *

I could not believe that we were not entitled to a proper investigation and answers to questions that remain unanswered due to

incompetence and a clear pattern of obstruction, lies, and deceit propagated by the above mentioned authorities.... Boyd/Allen's theory has been supported and propped up by a convoluted investigative practice that has desperately tried to show why their theory was right and used police resources and energy to systematically and in a calculated way effect the following:

1. Establish and reinforce their contention that Rio was a "druggie", had a dark side, and was a binge narcotics user

2. Ignore evidence that indicates otherwise

3. Destroy evidence

4. Lie to Mr. Nicholas to throw him of the trail

5. Propagandize through email and the campus newspaper to plant seeds of doubt in the student body and hence hamper efforts to get to the truth

6. Protect Brandon Reese from prosecution

7. Help Reese to avoid consequences of illegal and obfuscatory behavior

> 8. Delay follow up investigation ordered by President Trefny until the very end of the semester allowing valuable time to lapse
>
> 9. Ignore questions that were supposed to have been addressed in said investigation

Id., Exhibit J, pp. 1, 2.

The plaintiffs filed this case on October 19, 2005. In their First Amended Complaint [# 27], filed August 16, 2006, the plaintiffs assert two claims under 42 U.S.C. § 1983. In their first claim for relief, the plaintiffs alleged that defendants Boyd, Allen Cheuvront, and Francisco, acting under color of state law, agreed to suppress, conceal, and deprive the plaintiffs of evidence demonstrating that Rio Nicholas was a victim of homicide, and that his death was not caused by a self-induced drug overdose. In their second claim for relief, the plaintiffs allege that the defendants, acting under color of state law, deprived the plaintiffs of evidence of Rio Nicholas's homicied, and denied the plaintiffs the evidence necessary to bring and maintain one or mor causes of action for damages for Rio Nicholas's wrongful death.

Appendix B

III. STATUTE OF LIMITATIONS

The statute of limitations applicable to § 1983 actions in federal courts is the statute of limitations of the state in which the court is located. *Board of Regents v. Tomanio*, 446 U.S. 478, 483-84 (1980). For § 1983 actions, the court should use the statute of limitations for tort actions and the recovery of personal injuries. *Wilson v. Garcia*, 471 U.S. 261, 276 (1985). The two year statute of limitations provided in § 13-80-102, C.R.S., is applicable to § 1983 claims filed in the District of Colorado. *See Blake v. Dickason*, 997 F.2d 749 (10th Cir.1993).

Although the period of limitations is provided by a state statute, federal law governs questions concerning the accrual of a federal cause of action. *Baker v. Board of Regents of State of Kan.*, 991 F.2d 628, 632 (10th Cir.1993). "A civil rights action accrues when the plaintiff knows or has reason to know of the injury which is the basis of the action." *Id.* The injury which is the "basis of the action" in such a case is the violation of some constitutional right, not the physical, mental, or other harm that may have been, or will be, occasioned by it. *Smith v. City of Enid By and Through Enid City Com'n*, 149 F.3d 1151, 1154 (10th Cir.1998). A claim under § 1983 accrues when the plaintiff knows or should know that his or her constitutional rights have been violated. *Id.*

The defendants argue that the plaintiffs' claims are barred because the two year period of limitations had expired before the plaintiffs filed this case. The

defendants cite, *inter alia*, the plaintiffs' May, 2003, letters to Dave Thomas as a clear indication that the plaintiffs were aware of facts, which they perceived as indicating that the defendants had taken actions, or had failed to act, in a manner that violated the plaintiffs' constitutional rights. The plaintiffs argue that they did not "learn until the spring or summer of 2005 that their son had likely died as a result of the wrongful conduct of other students, individuals who could have been the defendants in wrongful death cause of action, *but for the intentional conduct of Defendants to obstruct and cover up their conduct.*" *Plaintiffs' Response* [# 54], filed January 8, 2007, p. 4 (emphasis in original). Without evidence that their son died as the result of the wrongful conduct of others, the plaintiffs argue, they could not have pursued a wrongful death action against those who killed their son. *Id.*

The undisputed facts in the record demonstrate that in May, 2003, when the plaintiffs each wrote letters to Dave Thomas, the plaintiffs were aware of myriad facts that they now claim constitute a violation of their constitutional rights. Their § 1983 claims in this case are founded on the various criticisms of the defendants' investigation of Rio Nicholas's death which they cited in their May, 2003, letters to Dave Thomas, and which they again cite in their First Amended Complaint. In his May 7, 2003, letter to Dave Thomas, plaintiff John Nicholas said:

> There is a preponderance of evidence to support our contentions that Rio could not

> have acted alone, did not die in the shower, had a very large amount of cocaine in his system and was at odds, to say the least, with the "Dirty People" (Reese, Jaberniks, Snyder, etc.) . . .

Motion for Summary Judgment [# 43], filed December 8, 2006, Exhibit J, p. 1. Plaintiff Brenda Nicholas expressed essentially the same awareness in a letter she wrote one day earlier.

Again, a claim under § 1983 accrues when the plaintiff knows or should know that his or her constitutional rights have been violated. *Id.* The undisputed facts in the record demonstrate that the plaintiffs had such an awareness no later than May 7, 2003. The initial complaint in this case was filed on October 19, 2005, more than two years later.

Assuming that the defendants' actions caused the plaintiffs to forfeit their ability to pursue a wrongful death action based on the death of their son, and assuming that injury was not suffered until two years after Rio Nicholas's death, that fact does not mean that the plaintiffs' § 1983 causes of action accrued on a date later than they otherwise would accrue. "A plaintiff need not know the full extent of his injuries before the statute of limitations begins to run." *Indus. Constructors Corp. v. U.S. Bureau of Reclamation*, 15 F.3d 963, 969 (10th Cir.1994). When determining the date on which a § 1983 claim accrued, the relevant inquiry is when were the plaintiffs aware of the alleged violation of their

constitutional rights. It would be analytically incorrect to link accrual of a cause of action under § 1983 to a plaintiff's knowledge concerning the extent of the harm the constitutional violation had caused or may cause. Viewing the undisputed facts in the record in the light most favorable to the plaintiffs, I conclude that the plaintiffs' § 1983 claims are barred by the applicable statute of limitations.

IV. ORDERS

THEREFORE, IT IS ORDERED as follows:

1. That the **Defendants' Motion for Summary Judgment** [# 43], filed December 8, 2006, is **GRANTED;**

2. That judgment **SHALL ENTER** in favor of the defendants, Richard B. Boyd, Robert Allen, Harold Cheuvront, and Robert Francisco, and against the plaintiffs, John and Brenda Nicholas, individually and as successors in interest to the Estate of Demetrios John Nicholas, deceased;

3. That the plaintiffs' claims are **DISMISSED WITH PREJUDICE;**

4. That the Trial Preparation Conference set for November 16, 2007, at 11:30 a.m., and the trial scheduled to commence on Monday, December 3, 2007, are **VACATED;**

5. That defendants are **AWARDED** their costs to be taxed by the Clerk of the Court pursuant to Fed.R.Civ.P. 54(d)(1) and D.C.COLO.LCivR. 54.1; and

6. That any other pending motions, including the motions docketed as [# 35] and [# 36], both filed October 30, 2006, are **DENIED** as moot.

Dated September 18, 2007, at Denver, Colorado.

BY THE COURT:

s/ Robert E. Blackburn
Robert E. Blackburn
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DENYING PETITION FOR REHEARING FILED APRIL 2, 2009

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 07-1444

JOHN NICHOLAS, individually and as successor in interest to the Estate of Demetrios John Nicholas, et al.,

Plaintiffs - Appellants,

v.

RICHARD M. BOYD, et al.,

Defendants - Appellees.

ORDER

Before **KELLY**, **LUCERO**, and **MURPHY**, Circuit Judges.

Appellants' petition for rehearing is denied.

Entered for the Court,

s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER, Clerk